

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Reexamination of the Comparative)	MM Docket No. 95-31
Standards for Noncommercial)	
Educational Applicants)	

To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF THE SISTER SHERRY LYNN FOUNDATION, INC.

The Sister Sherry Lynn Foundation, Inc. (hereafter "SSLF"), by its undersigned counsel and pursuant to the Commission's FURTHER NOTICE OF PROPOSED RULE MAKING (hereafter the "Notice"), FCC 98-269¹, in the above captioned proceeding, hereby respectfully submits these comments on the proposed standards for deciding among competing applicants for noncommercial, educational ("NCE") broadcast stations.² In summary, SSLF does not believe that the traditional comparative hearing process should be used in the future, nor should a lottery or random selection procedures be utilized. SSLF favors a point system utilizing criteria that do not include minority preferences or credits. Moreover, SSLF submits that the Commission lacks the statutory authority to prohibit NCE applicants from applying for non-reserved FM allotments, and believes that such exclusion is contrary to the Commission's policy of increasing the diversity of

¹ Released October 21, 1998.

² The deadline for filing comments was extended to January 28, 1999, pursuant to the Commission's Order in MM Docket No. 95-31, released on December 3, 1998, DA 98-2489.

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broadcast voices. SSLF believes there are legally sound and expeditious bases for dealing with competing commercial and NCE applications for such frequencies.

I. BACKGROUND.

1. SSLF is the Commission permittee of noncommercial educational broadcast station KXFT(FM) Sulfur, Oklahoma. In addition, SSLF is a competing applicant for noncommercial, educational FM stations proposing the use of frequencies in the reserved portion of the FM band. SSLF respectfully submits these comments for the consideration of the Commission.

II. DISCUSSION

A. PROCEDURES ON RESERVED NCE SPECTRUM.

Comparative Hearings.

2. SSLF agrees that the traditional comparative hearing process in deciding among competing applicants for NCE frequencies is useless and should have never been implemented by the Commission. The comparative hearing process is time consuming and expensive for the applicants and usually results in a time sharing arrangement that is not realistic. However, in replacing this ridiculous vestige of the Commission's prior regulatory prerogative, the Commission should not implement a system that is even more ridiculous.

Lotteries.

3. Lotteries are a form of legalized gambling. While in the Balanced Budget Act of 1997 the Congress affirmed the authority of the Commission to use lotteries as a method for resolving competing applications for NCE spectrum, it should not choose to do so. The Commission has found in the past in connection with lottery proposals for broadcast licenses that any potential gains in efficiency that may be realized by the use of random selection are significantly outweighed

by the high probability that there will be a corresponding decrease in the quality of broadcast licensees chosen.³ This remains a compelling reason to continue to avoid the use of lotteries.

4. The Notice contemplates “weighing” lotteries through preferences based on certain “meritorious” criteria that can be claimed by applicants in order to “increase their chances” of selection. While these enhancements may render a lottery somewhat less arbitrary, any form of random selection will always be arbitrary and result in the selection of less qualified NCE applicants. SSLF does not believe that the public interest mandate of the Communications Act can be met in a decision-making process that is as heavily weighted by randomness as it is by applicant merit.

Point Systems.

5. The point system proposal for comparative decision-making makes sense in that it allows for a comparative analysis resulting in the “winner” being the applicant proposing the most meritorious use of the rapidly depleting NCE spectrum. A point system simply results in the selection of the best-qualified applicant

6. The Commission must not attempt to foolishly incorporate a “minority preference” in connection with such a point system. In *Adarand Constructors, Inc. v. Peña*, (“*Adarand*”) the United States Supreme Court essentially voided the Commission’s various past bases for awarding minority and female preferences in comparative broadcast analyses.⁴ In *Adarand*, the Court held that all minority preferences, including those involving so-called “benign discrimination”, must in the future meet the most exacting standard of “strict scrutiny.” Under this *Adarand* standard, minority preferences must be designed to respond to direct evidence of

³ *Random Selection of Broadcast Applicants*, 67 RR 2d 644 (1990).

discrimination or fail to survive a Constitutional review. While the *Adarand* decision did not directly discuss how remedial minority preferences can survive such “strict scrutiny”, the earlier Supreme Court case of *Richmond v. J. A. Croson Company* (“*Croson*”) delineates such a standard.⁵ *Croson* requires a “strong basis in evidence for the conclusion that remedial action is necessary.” In the context of NCE licensing, there is no strong factual evidence that discrimination against minority applicants has existed. In fact, the NCE spectrum contains numerous NCE stations licensed to predominantly black colleges and universities. Therefore, there is no basis for the Commission to implement a minority preference in connection with its comparative consideration of NCE applications.

COMPARATIVE COVERAGE.

7. SSLF believes that the one sound factual basis for giving comparative points to NCE applicants is the factor of who will more broadly serve the public. One merit point should be given to competing applications that propose facilities that will provide service within its 60 dBu contour that is at least 10% greater than the service area of other applicants.

OWNERSHIP OF OTHER NCE STATIONS.

8. To the extent the Commission believes that diversity of ownership should be a comparative criterion, SSLF would suggest that one point accrue to NCE applicants who own less than some total number of NCE stations. SSLF would suggest that any NCE applicant holding less than twenty NCE licenses should receive one comparative merit point.

⁴ 115 S. Ct. 2097 (1995).

EDUCATIONAL INSTITUTIONS AND STATE NETWORKS.

9. Section 73.503 of the Commission's rules does not require that a NCE applicant be an accredited state, regional, or national educational organization.⁶ Nor does it require that such applicants be part of a "state-wide plan" for NCE broadcasting. The Commission does not give a comparative benefit to a NCE applicant based on its status as an educational institution, accredited or otherwise, or as a member of a state organized network or plan, and should not do so in the future

NONCOMMERCIAL EDUCATIONAL APPLICANTS ON "COMMERCIAL" FREQUENCIES.

(1) Preference Based on Availability of Alternative Channels.

10. Neither the Communications Act nor the Commission's rules reserve any portion of the broadcast spectrum exclusively for the use of for-profit, commercial operators. Accordingly, the Commission lacks statutory authority to preclude NCE applicants from submitting applications to utilize non-reserved FM channels or AM frequencies. Presumably Congress would have implemented such a restriction in connection with the Tax Reform Act of 1997 had the competitive bidding limitation to commercial broadcast applications adopted therein been intended to prompt the Commission to label NCE applications "ineligible" to apply for non-reserved channels. It did not do so. The intent of Congress is clearly not to prohibit NCE applicants from seeking non-reserved FM allotments. Moreover, it is entirely inconsistent with the Commission's long-standing policy, as enunciated in the Notice, of encouraging the "inclusion" of

⁵ 488 U.S. 468 (1989).

⁶ *C.f. Lower Cape Communications, Inc.*, 47 RR 2d 1577 (1980).

diverse groups, including minorities, in broadcasting to adopt a policy of "exclusion" when it comes to non-profit, noncommercial applicants desiring to use non-reserved band FM channels.

11. In cases in which there are both commercial and NCE applicants for non-reserved channels, SSLF submits that the NCE applicants should be given a preference if it can be shown that there are no reserved NCE frequencies available that will allow a NCE licensee to serve the community to which the non-reserved channel is assigned with a 70 d/b/u service contour. In this case, the commercial applications should be dismissed, and any competing NCE applications should be processed pursuant to the NCE procedures adopted herein. On the other hand, if it can be shown that there are reserved-band, NCE frequencies available for use that will allow for coverage over the community of license with a 70 d/B/u contour, the NCE applications should be dismissed in favor of an auction among the commercial applicants. This procedure will allow for either commercial or NCE use of a non-reserved channel depending on whether there is a NCE alternative. Moreover, such a procedure renders the current process of having reserving non-reserved channels for NCE use in a rule making proceeding unnecessary, since a non-reserved channel can be allocated to a community where there are no NCE channels available for use, and a preference will accrue to any the NCE applicants who may apply over any commercial applicants.

WHEREFORE, The Sister Sherry Lynn Foundation, Inc. respectfully submits these comments to assist the Commission in formulating a legal and equitable basis for choosing among competing NCE applications.

Respectfully submitted,

The Sister Sherry Lynn Foundation, Inc.

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